IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.6383 OF 2005

The Thane Janata Sahakari Bank Ltd.
Having its Head Office at Madhukar
Bhavan, Road No.16, Wagle Estate,
Thane (W) 400 604. .. Petitioner

v/s.

1. The Commissioner of Sales Tax,
   Regional Office, Mumbai.

2. Asstt. Commissioner of Sales Tax,
   The Office of the Assistant Commissioner
   (Assessment), B-192, Sales Tax Office,
   Thane.

3. The State of Maharashtra .. Respondents

Mr.R.S.Apte with Mr.M.V.Limaye for the petitioner.

Mr.Vinay Sonpal, Assistant Government Pleader for the respondents.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 18TH APRIL, 2006.

ORAL JUDGMENT (Per R.M.Lodha, J.)

On 5th December, 2005, the court observed that considering the controversy involved, and that may arise in other matters as well, writ petition needs to be heard and disposed of at the admission stage. We, accordingly, heard the counsel for the

parties for final disposal of the writ petition.

2. The Thane Janata Sahakari Bank Limited is a scheduled co-operative bank incorporated under the Maharashtra Co-operative Societies Act, 1960 and is in the banking business. For the sake of convenience, we shall refer the petitioner as `the Bank' hereinafter. One M/s.Charishma Cosmetics Pvt.Ltd. (for short `the company') had credit facilities with the Bank. According to the Bank, as on 30th June, 2004, the company was indebted to the Bank in the sum of Rs.2,32,00,000/- against the cash credit facility and Rs.10,00,000/- towards the working capital term loan. For availing the credit facilities, the company had mortgaged factory, land and building by way of equitable mortgage in favour of the bank on 18.2.1997. The account of the company was classified as non-performing assets and the bank decided to recover the due amount against the company under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter to be referred to as `Securitisation Act'). Before the Bank decided to initiate recovery proceedings against the company under the Securitisation Act, 2002, it is pertinent to notice that the sales tax dues from the company amounting to Rs.3,27,24,096/- for the assessment period from 1995-96 and 1999-2000 were outstanding under the Bombay Sales Tax Act and Central Sales Tax Act. The company had also not paid with returns an amount of Rs.35,58,672/- that they collected as sales tax. In other words, an amount of Rs.3,62,82,768/- was

already outstanding against the company towards the sales tax dues. For recovery of the said sales tax dues, the proceedings under the Maharashtra Land Revenue Code were initiated . The notice in form No.39 dated 7.11.2003 was also served upon the bank asking them to discharge the sales tax liability of the company. The sales tax authorities also executed warrant of attachment; took possession of the properties of the company and put seals thereon.

3. The case of the Bank is that on 25.11.2004 when its officer conducted a visit to the company, it was found that the sales tax authorities had affixed seals on the properties of the company. On 2.12.2004, the bank sent a letter to the Assistant Commissioner of Sales Tax (respondent No.2) pointing out that the Bank has first charge in respect of the company's movable and immovable properties. The information about the sales tax proceedings was also sought. The respondent No.2 was also asked not to take further action in respect of the movable and immovable properties of the company without prior notice to the bank.

4. The Bank thereafter issued notice on 20.12.2004 under section 13(2) of the Securitisation Act in respect of the hypothecated and mortgaged properties. It became necessary, according to the Bank, since the company failed to clear the dues. The actual possession of the movable and immovable properties was taken by the Bank on 15.2.2005. The valuation of the said

properties was carried out and the auction date of the said properties was fixed on 13.5.2005. In the auction, the properties of the company were sold for Rs.66,31,001/- and the possession was handed over to the auction purchaser. The Bank appropriated the sale proceeds towards the due amount from the company.

5. On 11th July, 2005, the Assistant Commissioner of Sales Tax sent a letter to the Bank informing them that the sales tax dues are the first charge against the properties of the company. The Bank was informed about the recovery action taken against the properties of the company.

6. The Bank responded to the letter dated 11th July, 2005 by sending the reply on 14th July, 2005. The Bank asserted their right of first charge in respect of the hypothecated and mortgaged properties of the company being secured creditor and brought to the notice to the sales tax authorities that they have recovered part of their loan dues from the sale of hypothecated and mortgaged properties of the company.

7. The letters were exchanged between the Assistant Commissioner of Sales Tax and the Bank asserting and reiterating their respective stand about the first charge on the movable and immovable properties of the company. The Assistant Commissioner of Sales Tax emphasised that the recovery of sales

tax dues has priority even over the secured creditors and requested the Bank to deposit the proceeds of the sale with the sales tax department. On the other hand, the Bank refused to accede to the request of the Assistant Commissioner of Sales Tax. By the notice dated 16th August, 2005, the Assistant Commissioner of Sales Tax called upon the Bank to show cause as to why the action may not be taken against them under section 39 of the Bombay Sales Tax Act and for repayment of the sum of Rs.49,68,614/- in addition to the auction proceeds. The Bank responded to the show cause notice by giving reply on 18th August, 2005 and then filed the present writ petition. The Bank has prayed that the notice dated 16th August, 2005 issued by the respondents be quashed and set aside and for direction to the respondent No.2 to withdraw and cancel the said notice and from initiating any action against the Bank.

8. The counsel for the bank raised the following contentions:

(one) That there being conflict under section 38C of the Bombay Sales Tax Act, 1959 and section 35 of the Securitisation Act, the Securitisation Act being Central Act must prevail.

(two) That even otherwise, the Securitisation Act, being later enactment having been enacted in the year 2002, must prevail over the Bombay

Sales Tax Act.

(three) That under section 169 of the Maharashtra Land Revenue Code, 1966, the State Government can claim priority over the unsecured debts but the Bank being secured creditor, the Bank has first and exclusive charge over the properties of the company and has priority over the sales tax dues.

9. The counsel for the Bank relied upon the following decisions: (i) Dena Bank Ltd. v. Bhikubhai Prabhudas & Co. and others, (2000)5 SCC 694, (ii) Maruti Udyog Ltd. v. Ram Lal and others, (2005)2 SCC 638 and (iii) State of West Bengal v. Kesoram Industries Ltd. and others, (2004)10 SCC 201.

10. Mr.Vinay Sonpal, the Assistant Government Pleader would submit that the Securitisation Act provides for speedy machinery for recovery of the Bank's debt. The Securitisation Act is an Act to regulate the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest. The said Act has been enacted by the Parliament under Entry 45 of List I of the Constitution of India while the Bombay Sales Tax Act, 1959 is enacted by State Legislature under Entry 54 of List II. The two enactments deal with entirely different subjects and operate in different fields. According to him, there is no conflict in section

38C of the Bombay Sales Tax Act and section 35 of the Securitisation Act which is only procedural enactment. The Government dues having priority under section 38C are not overridden by section 35 of the Securitisation Act. His submission is that section 38C of the Bombay Sales Act gives precedence to the sales tax dues and such dues have priority over the other charges.

11. In support of his contentions, the Assistant Government Pleader relied upon the following decisions: (i) Imperial Chit Funds (P) Ltd. (In liquidation) v. Income Tax Officer, (1996)86 Company Cases 555; (ii) State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others, (1995)2 SCC 19; (iii) State Bank of India v. Podar Mills Ltd. and others, (1992)74 Company Cases 710; (iv) Allahabad Bank v. Canara Bank and another, AIR 1991 Bombay 370; (v) The Bharat Co-operative Bank Ltd. v. D.V.Patil & ors., 2004(2) All MR 610; (vi) Bank of Maharashtra v. Konkan Chemicals Pvt.Ltd. and others, 2000(3) Mh.L.J. 801; (vii) State of Maharashtra v. The Official Liquidator, 2004 Mah.L.J. 486; (viii) Syndicate Bank v. Official Liquidator, Wester Works Engineers Ltd. and others, (1999)2 Company Law Journal, 211; (viii) Janata Sahakari Bank Ltd. v. Assistant Provident Fund Commissioner and Recovery Officer and ors. (Writ petition No.639 of 2005) decided on 23.6.2005 and (ix) Herbert and another v. Vaughan and others, (1972)3 All England Report, 122.

12. The Securitisation Act came into effect from 17th December, 2002. Interalia, the object for enactment of the said Act is to empower the banks and financial institutions in India to take possession of securities and sell them without pursuing the cumbersome legal remedy provided in the Civil Procedure Code or for that matter the special remedy provided under Recovery of Debts due to Banks and Financial Institutions Act, 1993. The necessity of enactment of the Securitisation Act arose as the legislature found that legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. Narasimhan Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms considered the need for changes in the legal system in respect of the said areas. These committees suggested amongst others, enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. The recommendations of these committees led to the enactment of the Securitisation Act.

13. Section 13 of the Securitisation Act provides for enforcement of the security interest by the secured creditor without the intervention of the court or the Debt Recovery Tribunal. It overrides sections 69 and 69A of the Transfer of

Property Act, 1882 and empowers the secured creditor to enforce the security interest in accord with the procedure prescribed therein.

14. Section 35 of the Securitisation Act upon which much stress has been placed by the counsel for the bank provides that the provisions of the Securitisation Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

15. Sections 13 and 35 of the Securitisation Act have non-obstante clause. By virtue of section 13(1), the provisions contained in sections 69 and 69A of the Transfer of Property Act are overridden and any security interest created in favour of any secured creditor is capable of being enforced without the intervention of the court or Tribunal in accordance with the provisions of Securitisation Act while section 35 overrides other laws or instruments in the case of inconsistency. The question that falls for our consideration is whether section 35 of the Securitisation Act is inconsistent with section 38C of the Bombay Sales Tax Act and consequently overrides the said provision.

16. Section 38C of the Bombay Sales Tax Act, 1959 reads thus-

> “S.38C. Liability under this Act to be first charge.-

> Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge in any Central Act for the time being in force, any amount of tax, penalty, interest or any other sum, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or, as the case may be, person."

17. The reading of the section 38C suggests that liability under the Bombay Sales Tax Act shall be first charge. It overrides anything contained in any contract which is contrary to section 38C. It provides that any amount of tax, penalty, interest or any other sum payable by a dealer or any other person under this Act shall be first charge on the property of the dealer or that person but subject to any provision regarding first charge in any Central Act for the time being in force. In other words, if in any Central Act provides for first charge, the charge created under section 38C of Bombay Sales Tax Act is overridden. Conversely, if the Central Act does not provide for first charge in respect of the liability under the said Act, the first charge created under section 38C of Bombay Sales Tax Act shall hold the field. We wanted to know from the counsel for the petitioner as to under which provision of the Securitisation Act , the provision for first charge is made. The counsel, in answer, referred to section 13 of the Securitisation Act. Having read section 13 carefully, we are unable to agree with the counsel for the Bank that this provision creates first charge. Section 13 is not a provision regarding first charge. It provides the machinery for realisation of the security without intervention of the court or the Tribunal by a secured

creditor. It overrides the provisions contained in sections 69 and 69A of the Transfer of Property Act which empowers the mortgagee to sell or concur in selling the mortgaged property or any part thereof in default of payment of the mortgage money without intervention of the court in the circumstances referred to in section 69 and for payment of Court Receiver as provided in section 69A. Section 13 of the Securitisation Act is a procedural provision for expeditious realisation of security interest by a secured creditor in substitution of normal process of recovery of debts through the court or the Tribunal. It does not create the charge by itself much less first charge; rather it provides for process for enforcement of charge that has been created under the contract in favour of the secured creditor. No other provision was cited by the counsel for the Bank either with reference to the Securitisation Act or any other Central Act which provides for first charge in favour of the Bank. As a matter of fact, basis of the charge is the mortgage that has been created in favour of the Bank by the company for availing the credit facilities and that is under the contract and not under any statutory provision much less any Central Act.

18. The Bombay Sales Tax Act and the Securitisation Act have been enacted by the competent legislatures for different purposes and operate in different fields. The Bombay Sales Tax Act is enacted by the State Legislature under Entry 54 of List II in the Seventh Schedule for levy of tax on the sale or purchase of certain

goods in the State of Bombay (now State of Maharashtra). On the other hand, the Securitisation Act has been enacted by the Parliament under Entry 54 of List I for regulating the securitisation and reconstruction of financial assets and for enforcement of security interest. There is neither any conflict in these two Acts nor section 38C of the Bombay Sales Tax Act can be said to be inconsistent with section 35 of the Securitisation Act. The area of operation is entirely different and there is no overlapping anywhere.

19. Section 35 of the Securitisation Act may have had some bearing, if there was some provision in the Securitisation Act for first charge in favour of the banks and financial institutions. But neither section 13 nor any other provision under the Securitisation Act makes a provision for first charge.

20. There being no provision in the Securitisation Act providing for first charge in favour of the banks, section 35 of the Securitisation Act cannot be held to override section 38C of the Bombay Sales Tax Act, 1959 that specifically provides that the liability under the said Act shall be the first charge. The overriding provision contained in section 38C is only subject to the provision of the first charge in the Central Act holding the field. The case of the Bank is not covered by the expression, “subject to any provision regarding first charge in any Central Act for the time being in force” and that being the position, section 38C is not

overridden by section 35 of the Securitisation Act.

21. In Janata Sahakari Bank Limited (Writ petition No.639 of 2005 decided on 23.6.2005), the Division Bench of this court was concerned with an issue relating to the impact of the provisions of the Securitisation Act on the provisions of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. Dealing with the said issue, the Division Bench of this court in paragraph 8 held thus-

> "8. The contention of Mr.Borkar based on the overriding effect of the provisions of section 35 of the Securitisation and Reconstruction Act has no substance in our judgment. Normally the use of a phrase by the Legislature in an enactment stating that its provisions will have the effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force" is another way of saying that the enactment in which the non-obstante clause occurs usually would prevail over the other law. The non-obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provisions of the law, but merely as clauses which remove all obstructions which might arise out of the operation of the enactment which contains a non-obstante clause. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. If we examine the scheme of the two Acts in question i.e. The Securitisation and Reconstruction Act and the EPF and MP Act, they seem to operate in two different fields and there is no conflict in them. Undoubtedly the intention of the Parliament in enacting the Securitisation and Reconstruction Act was to ensure that the banks and financial institutions can quickly and effectively recover the amount due by taking possession of the secured assets of the defaulters instead of having resort to the cumbersome method of recovery through civil

courts or tribunals. The said Act is enacted to have yet speedier legal method to recover the dues of the banks and financial institutions. The provisions of section 13 of the said Act give right to the banks and financial institutions to take possession of the secured assets and realise their dues by resorting to any of the four methods provided under sub-section (4) of section 13. The intention of the Legislature was not to give any precedence to the dues of the banks and financial institutions over the statutory dues under such provisions as made in the said Act. The Act does not have any substantive provision giving precedence to the dues of the banks and financial institutions. Whereas the Legislature specifically enacted sub-section (4) of section 11 declaring that the amounts due as contribution to the Employees Provident Fund shall be made a first charge on the assets of the establishment and that, notwithstanding anything contained in any other law for the time being in force, it shall be paid in priority against all other dues. The reason for this is obvious. The Legislature intended to secure the terminal social security benefit made available by the statute to the working class. Taking into consideration that EPF and MP Act is a social benefit legislation, and the evil consequences of Provident Fund dues being defeated by prior claim of the secured and un-secured creditors, the Legislature took care to declare that irrespective of when the debt is created the dues under the EPF and MP Act would always remain first charge and shall be paid first out of the assets of the establishments. The non-obstante clause contained in section 35 of the Securitisation and Reconstruction Act has to be construed and given effect to having regard to the object and purpose of the said Act and so construed it does not in any way effect the operation of the provisions of EPF and PM Act. We are therefore of the view that the respondent No.1 shall be entitled to exercise power as a Recovery Officer for recovering Provident Fund dues."

22. What has been emphasised by the Division Bench in the case of Janata SahakSahakari Bank Ltd. is that the intention of the Legislature by enacting the Securitisation Act is not to give precedence to the dues of the banks and the financial institutions

over the statutory dues. Of course, that case related to the statutory dues under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and the present case relates to the Bombay Sales Tax Act but the observation made in para 8 of the aforesaid judgment applies aptly to the scheme of section 35 of the Bombay Sales Tax Act.

23. The three Judge Bench of the Supreme Court in the case of State Bank of Bikaner & Jaipur (supra) dealt with the question of first charge over the property of the dealer under section 11AAAA of the Rajasthan Sales Tax Act vis-a-vis sections 58 and 100 of the Transfer of Property Act. Section 11AAAA of the Rajasthan Sales Tax Act like section 38C of the Bombay Sales Tax Act provides for the liability under the said Act to be first charge. Section 11AAAA reads, “Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, penalty, interest and any other sum, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person.” The language of section 11AAAA is bit different from section 38C of the Bombay Sales Tax Act. However, the creation of first charge in favour of the Bank being not under any Central Act, the decision of the Supreme Court in the case of State Bank of Bikaner and Jaipur becomes relevant. In paragraphs 7 and 8 of the report, the Supreme Court observed thus-

"7. It is, therefore, necessary to consider the effect of Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 on an existing mortgage in respect of the property of the dealer or the person liable to pay sales tax or other sums under the Rajasthan Sales Tax Act. 1954. Section 100 of the Transfer of Property Act deals with charges on an immoveable property which can be created either by an act of parties or by operation of law. It provides that where immoveable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, a charge is created on the property and all the provisions in the Transfer of Property Act which apply to a simple mortgage shall, so far as may be, apply to such charge. A mortgage on the other hand, is defined under Section 58 of the Transfer of Property Act as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a mortgage and a charge was considered by this Court in the case of Dattatreya Shanker Mote v. Anand Chintaman Datar. The Court has observed (at pages 806-807) that a charge is a wider term as it includes also a mortgage, in that, every mortgage is a charge, but every charge is not a mortgage. The Court has then considered the application of the second part of Section 100 of the Transfer of Property Act which inter alia deals with a charge not being enforceable against a bona fide transferee of the property for value without notice of the charge. It has held that the phrase "transferee of property" refers to the transferee of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage.

8. In the present case we have to consider whether the statutory first charge which is created under Section 11-AAAA of the Rajasthan Sales Tax Act over the property of the dealer or a person liable to pay sales tax and/or other dues under the Rajasthan Sales Tax Act, is created in respect of the entire interest in the property or only the mortgagor's interest in the property when the dealer has created a mortgage on the property. In other words, will the statutory first charge have priority over an earlier mortgage. It was urged by Mr.Tarkunde, learned counsel for the appellant-bank that at the time when the statutory first charge came

> into existence, there was already a mortgage in respect of the same property. Therefore, the only property which was possessed by the dealer and/or person liable to pay tax or other dues under the Rajasthan Sales Tax Act, was equity of redemption in respect of that property. The first charge would operate, therefore, therefore, only on the equity of redemption. The argument though ingenious, will have to be rejected. Where a mortgage is created in respect of any property, undoubtedly, an interest in the property is carved out in favour of the mortgagee. The mortgagor is entitled to redeem his property on payment of the mortgage dues. This does not, however, mean that the property ceases to be the property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer, the property subjected to the first charge is the entire property of the dealer. The interest of the mortgagee is not excluded from the first charge. The first charge, therefore, which is created under Section 11-AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption as urged by Mr.Tarkunde."

24. The Supreme Court with reference to first charge over the property of the dealer under section 11-AAAA of the Rajasthan Sales Tax Act vis-a-vis earlier mortgage of the same property held that the statutory first charge has precedence over an existing mortgage. The Bombay Sales Tax Act provides for first charge in respect of the sales tax liability over the property of the dealer or the concerned person and that statutory first charge (in the absence of any other statutory first charge created in favour of the Bank) has precedence over the bank's charge based on contractual mortgage.

25. In the case of Bharat Co-operative Bank, it was held by us

that section 38C of the Bombay Sales Tax Act read with section 169 of the Maharashtra Land Revenue Code leaves no manner of doubt that the recovery of sales tax dues has priority over the secured creditors. The said judgment is not elaborate as it was given at the motion hearing stage while considering whether writ petition deserved to be admitted or not. However, we considered section 38C of the Bombay Sales Tax Act and section 169 of the Maharashtra Land Revenue Code in the light of the submission made by the counsel for the bank that the bank being the secured creditor and the property having been mortgaged with the bank, such property could not be put to sale under section 38C of the Bombay Sales Tax Act. After referring section 38C and 169, we held thus-

> "6. We are afraid, Section 169 of the Maharashtra Land Revenue Code, 1966 does not support the submission of the learned Counsel for the petitioner at all as contended. By virtue of Section 38-C of the Bombay Sales Tax Act, the recovery of sales tax dues has first charge. The said recovery is made as arrears of land revenue and a conjoint reading of Section 38-C of the Bombay Sales Tax Act and Section 169 of the Maharashtra Land Revenue Code, 1944 leaves no manner of doubt that the recovery of sales tax dues has priority over the secured creditors."

26. Section 169 of the Maharashtra Land Revenue Code, 1966 reads thus-

> "169. Claims of State Government to have precedence over all others:- (1) The arrears of land revenue due on account of land shall be a paramount

> charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.
>
> (2) the claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter, shall have priority over all unsecured claims against any land or holder thereof."

27. Sub-section (1) provides that the arrears of land revenue outstanding on account of land shall be paramount charge on the land and on every part of it. Such charge shall have precedence over any other debt, demand or claim. Sub-section (2) provides that the claim of the State Government other than arrears of land revenue shall have priority but recoverable as revenue demand under Chapter XI of the Code and shall have priority over all unsecured claims against any land or holder thereof. Sub-section (2) of Section 169 upon which strong reliance has been placed by the counsel for the petitioner does not lead to the conclusion that the first charge created under section 38C shall not have precedence and priority over the secured dents. By virtue of section 38C of the Bombay Sales Tax Act, recovery of sales tax dues has first charge. The said recovery is made as arrears of land revenue and a conjoint reading of section 38C of the Bombay Sales Tax Act and section 169 of the Maharashtra Land Revenue Code leaves no manner of doubt that the recovery of sales tax

dues has priority over the secured creditors.

28. We may now deal with the two judgments relied upon by the counsel for the Bank. In Maruti Udyog Ltd., the Supreme Court while dealing with the non-obstante clause in two statutes held that when both statutes containing non-obstante clause are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the later shall prevail. There cannot be any doubt about the aforesaid legal position but in what we have already observed above, there is no conflict in section 35 of the Securitisation Act and section 38C of the Bombay Sales Act. There is no inconsistency and both provisions can be given effect to without any difficulty.

29. In so far as Kesoram Industries Ltd. is concerned, the counsel relied upon the observations made in paragraph 31 of the report. Paragraph 31 of the report reads thus-

> "31. Article 245 of the Constitution is the fountain source of legislative power. It provides- subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List".

Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in Hoechst Pharmaceuticals Ltd. v. State of Bihar. They are:

(1) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V.Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeration of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There

> the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List 1."

30. It is difficult to see how the aforesaid observations of the Supreme court can assist the case of the petitioner in the present case.

31. We, accordingly, hold that section 35 of the Securitisation Act has no effect whatsoever in the operation of section 38C of the Bombay Sales Tax Act. Section 35 of the Securitisation Act does not override section 38C of the Bombay Sales Tax Act and, therefore, based on Section 35 of the Securitisation Act, the Bank does not get precedence or for that matter priority over the statutory first charge under section 38C of the Bombay Sales Tax Act. Rather the statutory first charge under section 38C of the Bombay Sales Tax Act has precedence over the Bank's charge based on contract.

32. It what we have discussed above, we find no substance in any of the contentions raised by the counsel for the Bank.

33. It is not in dispute that before the process was initiated by the Bank under section 13 of the Act by issuance of notice dated 20th December, 2004, the sales tax authorities had already attached the properties of the company for recovery of sales tax dues. Despite the recovery process for outstanding sales tax dues having been initiated by the sales tax authorities who had a first charge under section 38C of the Bombay Sales Tax Act, the Bank in grossly illegal manner proceeded under section 13 of the Securitisation Act and sold the property of the company for recovery of its outstanding dues. The action of the Bank is wholly illegal and unauthorised.

34. The result is that we find no merit in the writ petition. It is dismissed with cost which we quantify at Rs.10,000/-. We also direct the petitioner to deposit the sale proceeds amounting to Rs.66,31,001/- with the respondent No.2 within four weeks from today.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)